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Opinion following rehearing

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MICHAEL McNATT, Defendant and Appellant.	A150775 (Sonoma County Super. Ct. No. SCR663564)

Around 4:30 p.m. on the afternoon of March 20, 2015, Ron Arrasmith left defendant Christopher McNatt at his trailer in Sonoma, telling him to keep an eye on the place. At some point later that evening, Ron Sauvageau arrived at the trailer looking for Arrasmith, and ended up struggling with McNatt. Shortly after 11:00 p.m., McNatt dumped a large barrel containing Sauvageau's body at Sonoma City Hall. After he drove away, he was pulled over and arrested for being under the influence of methamphetamine. A jury ultimately found McNatt guilty of second degree murder. On appeal, he argues that the statement he gave after his arrest was involuntary and thus admitted in violation of his right to due process, and that the prosecution's late disclosure of a statement Arrasmith gave the police requires reversal of his conviction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. McNatt's Arrest

At 11:19 p.m. on March 20, 2015, Sonoma County Deputy Sheriff Alan Collier observed McNatt driving a silver Toyota Tacoma pickup truck near the Acacia Grove Mobile Home Park in Sonoma. McNatt was speeding and driving out of his lane. Deputy Sheriff Collier conducted a traffic stop of the vehicle, and as he approached it, McNatt placed both of his hands out the driver's side window on his own initiative.

After Collier explained his reasons for the stop, McNatt said that he "had to get to his brother's house" to "take care of his brother" "with his knife." McNatt continued that he "needed to put his brother down" and that "there can only be one of us." Collier asked for McNatt's license, and when McNatt fumbled in his pocket for it for an extended period of time, Collier became nervous and ordered McNatt to place his hands on the steering wheel. Collier then observed what appeared to be dried blood on McNatt's hands.

Collier asked McNatt "a few times" whose blood was on his hands, and McNatt replied that it was "Ron['s]." McNatt went on to say that "Ron was his twin brother," that he was in space No. 2 of the Acacia Grove Mobile Home Park, and that he was in heaven. McNatt was making rapid, repetitive body movements, speaking quickly, and at times sweating profusely. Collier concluded that McNatt was under the influence of methamphetamine, and placed McNatt under arrest for being under the influence of a controlled substance. McNatt asked Collier to remove his handcuffs, and when Collier refused, McNatt said he would "take care" of him and "put [him] down."

Collier began transporting McNatt to the Santa Rosa jail. While en route, he heard a report over the radio that a dead body had been found inside a barrel near Sonoma City Hall. Collier contacted his supervisor and reported that he suspected McNatt might be

[1] We describe the facts and evidence at trial only for background and as relevant to the issues on appeal.

involved, and was then directed to take McNatt to the Sonoma County Sheriff's Office, where he was placed in an interview room.

2. Body at City Hall

Meanwhile, around 11:35 p.m., Uber driver Trevor Meeks noticed a 55-gallon plastic barrel covered with tarps near Sonoma City Hall. He called the Sheriff's office and reported that trash had been dumped.

Deputy Sheriff Preston Briggs arrived at the scene at 12:08 a.m. He observed a 55-gallon orange barrel with a blue tarp on top and other miscellaneous items around it, including a green duffel bag, a green couch cushion, and a Skilsaw. There appeared to be dried blood on the side of the barrel. As Briggs approached the barrel, he saw a human hand protruding from inside.

The barrel containing Sauvageau's body was taken to the Sonoma County Coroner's Office. In addition to the body, the barrel contained Sauvageau's passport, a bottle of his prescription medication, two pocket knives, and a cell phone. Sauvageau's eyes were black and blue, and he had several large lacerations on his face and several puncture wounds on his back.

Sauvageau's autopsy found two fractures of the skull, one to back of the head that was the cause of death, and another to the left side of the head inflicted post-mortem. He also had three "chop wounds" inflicted before death, likely by an instrument with a serrated blade, and four post-mortem superficial stab wounds on his back, as well as numerous other minor injuries. Anthony Chapman, who performed the autopsy, opined that the fatal injury to the head was consistent with having been inflicted with a hammer, and that the total of Sauvageau's injuries were consistent with having been inflicted during a "frenzied attack."

3. Arrasmith's Trailer

Investigators searched Arrasmith's trailer at the Acacia Grove Mobile Home Park beginning around 8:30 a.m. on March 21, 2015. They saw what appeared to be blood on the walkway approaching the trailer, on the steps leading up to the trailer, on the path leading around the trailer to a back patio, and about eight feet past the steps toward the

back patio. On the back patio, a green cushion was missing from a chair, potted plants had been knocked over, and eyeglasses and a hammer were located on the ground.

Inside the trailer, the kitchen area was in "disarray." On the floor were clothing, towels, and a comforter that appeared to have been used to clean up blood. There was also a green sweatshirt with a distinctive bleach stain and apparent blood on it. The hammer and the sweatshirt were swabbed and tested for DNA. The major contributor of the DNA on the sweatshirt was Arrasmith, the minor contributor was Sauvageau, and McNatt was excluded. The major contributor of the DNA found on the hammer was Arrasmith, and the minor contributor was undetermined, but McNatt and Sauvageau were both excluded.

4. McNatt's March 21 Interview

Detective Joseph Horsman interviewed McNatt beginning around 7:30 a.m. on March 21, and a videotape of the interview was played for the jury. McNatt relayed a version of events as follows. He was visiting Arrasmith at his trailer when Arrasmith said he would be back in an hour and left, asking McNatt to keep an eye on his trailer. Around dusk, Sauvageau came by the trailer, asked if Ron was there, and McNatt told him he was not. Sauvageau then went around the trailer to the back patio and sat in a chair. McNatt made various attempts to engage Sauvageau in conversation and to "get some feel for who this person is," but Sauvageau gave him back "nothing." McNatt then grabbed Sauvageau's shoulder and the two "wrestled." McNatt fought with Sauvageau for "almost 20 minutes," and McNatt "felt like it was kind of him or I type thing." With significant prompting from Detective Horsman, McNatt appeared to admit hitting Sauvageau with "objects in the yard" and "once or twice" with a hammer.[2]

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[2] For example:

"JH: So let me ask you this, you bring him inside, um, they told me a hammer was found and I don't know the significance of the hammer, um, but a hammer was found. So you bring him inside and you realize, I would imagine that you need to get this guy in the barrel or somewhere?

"CM: Oh, yeah, nothing like that.

Using a chain, McNatt dragged Sauvageau into the trailer, and eventually loaded his body into a barrel. He then used a dolly to load the barrel onto his truck. McNatt said he "heard you know, a couple kind of familiar voices you know, whether it was you know, my friend Ron and, and a buddy or whatever but they were off in the darkness."

"JH: No?

"CM: No. [¶] . . . [¶]

"JH: So how many times did you strike him with the hammer do you think before it was finished where you felt safe that he wasn't gonna get you?

"CM: I don't know that.

"JH: More than 10? More than 20?

"CM: No.

"JH: 30?

"CM: I would say no, I, I, . . .

"JH: 2, 3?

"CM: . . . I honestly I don't exactly remember striking him but I know I hit him . . .

"JH: Yeah.

"CM: . . . uh, with like, he got hit you know, with like objects in the yard you know, like it was in the throes of things . . .

"JH: Yeah.

"CM: . . . and um . . .

"JH: Well I can tell you a hammer was used at one point . . .

"CM: Alright but . . .

"JH: . . . just to fill you in because . . .

"CM: . . . I, if it was, it was not more than once or twice.

"JH: Got it.

"CM: Not 10 or 20.

"JH: Yeah. Yeah.

"CM: You know?

"JH: And I don't know, that's why I'm asking.

"CM: Yeah, I'm just saying it wasn't like, it was nothing brutal like that."

McNatt told them he had "to take care of this" and that he would be back. McNatt left the barrel near Sonoma City Hall because "kind of the hall of justice just popped in my mind . . . on the four corners of the square" and "it just felt normal to kind of bring it to a place where I know justice was dealt out for . . . decades, centuries."

5. Arrasmith's Statements

Shortly after 6:00 a.m. on March 21, Detective Jayson Fowler was at Arrasmith's trailer, waiting for a warrant so that he could begin searching the scene, when Arrasmith arrived. Arrasmith told detectives that he did not spend the night at his trailer. Arrasmith was detained, transported to the Sheriff's station, and interviewed.

Arrasmith's interview set forth the following timeline of the evening. McNatt came to his trailer between 12:00 noon and 1:00 p.m., and Arrasmith left at 4:30 p.m., telling McNatt to watch his place for him, and not to let anybody come in of whom he did not approve. From the trailer, Arrasmith went to a friend's house, where he remained until about 8:00 p.m. or 8:30 p.m. He then visited the El Verano Inn for a few minutes, after which he went to another friend's house, where he spent the night.[3] In the morning, he returned to his trailer, where he ran into the police. Arrasmith also said that he knew Sauvageau well, and that Sauvageau visited often and occasionally spent the night.

On March 24, detectives again visited Arrasmith's trailer, looking for the dolly. Arrasmith again arrived at the scene and was again brought to the Sheriff's station for an interview. He initially stated that the dolly was his, but then said that he had borrowed it from a neighbor on the night of March 19. He "recapped" his initial statements regarding his whereabouts the night of the murder, saying "very clearly" that he left his trailer around 4:30 p.m. and did not return until the following morning.

On April 3, Detective Horsman spoke to Arrasmith over the phone and articulated his theory that Arrasmith did not participate in the murder, but helped McNatt dispose of the body. Arrasmith agreed to meet with Horsman that same day at a McDonald's, where

[3] A surveillance camera at the El Verano Inn captured Arrasmith entering and leaving between 7:30 and 7:32 p.m. Arrasmith was wearing a green sweatshirt with a bleach stain on the front.

Horsman showed Arrasmith a photo from the El Verano Inn surveillance camera of the green sweatshirt he was wearing the night of the murder and noted it was found the following morning in his trailer. Arrasmith did not want to discuss the matter at that time.

On April 16, Arrasmith was again interviewed by Horsman. For the first time, he admitted returning to his trailer the night of the murder, stating that he "did show up, but I'd open the door and I saw some legs and I go what in the fuck's goin' on, and, eh, and then Chris, he, he was acting kinda weird, so I just slammed the fuckin' door!" He assumed that Sauvageau was "passed out" and denied having helped McNatt dispose of the body. Arrasmith admitted that he "must've changed" such that his sweatshirt ended up on the floor of the trailer, but said he did not "remember that part."

On May 13, Arrasmith was charged with accessory after the fact (Pen. Code, § 32).

On December 30, as part of a plea negotiation, Arrasmith was again interviewed at the Sheriff's station.[4] Arrasmith again told detectives that he left McNatt at his trailer around 4:30 p.m. In addition to the El Verano Inn, Arrasmith for the first time stated that he visited "Agua Caliente" that evening looking for drugs.[5] He also again stated that he had returned to his trailer on the evening of March 20 around 9:30 p.m. or 10:00 p.m., telling detectives that he found "somebody passed out" and that McNatt was smiling and watching a video. Arrasmith denied seeing any blood, and stated that he left immediately after changing his sweatshirt, went to a friend's house, and got high. He denied having anything to do with the murder or with loading Sauvageau's body into a barrel or into McNatt's truck.

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[4] As will be discussed in further detail below, the defense did not learn of this interview until Horsman testified at trial.

[5] In particular, Arrasmith stated: "Uh, but I-, that-, that's why I run around. I go by their house or anything. They're not home, so I'll go to my next one. And there's distance between. Sonoma, El Verano, you know? Agua Caliente. Anyway, so after that I just kept going around and then I guess it getting late, I thought it was around nine-thirty, I'm heading for Cookie's and I know I'll get high there."

6. McNatt's Trial

On October 14, 2015, the Sonoma County District Attorney charged McNatt with the murder of Ronald Sauvageau (Pen. Code, § 187, subd. (a)). The information further alleged that McNatt had used a deadly weapon (a hammer) in the commission of the offense (Pen. Code, § 12022, subd. (b)(1)), and that he had a previous conviction for burglary that was both a "strike" and a "serious felony." (Pen. Code, § 667, subds. (a)-(j).)

McNatt's trial took place in February of 2016. The prosecution's theory of the case was that Sauvageau arrived at Arrasmith's trailer while Arrasmith was not there, that McNatt struggled with him in the yard and ultimately killed him with a hammer, and that Arrasmith then helped McNatt dispose of the body after returning home and finding Sauvageau dead. The defense theory was that McNatt struggled with Sauvageau in the yard until Sauvageau was rendered unconscious and then dragged him into the trailer, but that it was Arrasmith who later committed the murder while McNatt drove to McDonald's, and that Arrasmith had then helped McNatt dispose of the body.[6]

McNatt testified in his own defense, telling the jury that he had wrestled with Sauvageau in the backyard, that they had each other in "simultaneous headlocks," and that at some point Sauvageau had stopped moving, but he denied hitting Sauvageau with any objects or causing any bleeding. He then carried Sauvageau into the trailer. Arrasmith had returned home, and sent McNatt to McDonald's, where he was captured on video between 10:05 p.m. and 10:12 p.m. When McNatt returned, there was blood all over the floor and Sauvageau had a jacket pulled over his face and head. McNatt then loaded the body into a barrel and onto his truck. Arrasmith told McNatt to leave the body "on some long road towards Napa," but instead he left it at Sonoma City Hall.

The defense subpoenaed Arrasmith as a witness, but he invoked his Fifth Amendment right to refuse to testify.

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[6] Alternatively, defense counsel argued that McNatt had killed Sauvageau in reasonable or unreasonable self-defense.

On March 1, 2016, the jury found McNatt guilty of second degree murder and found true the allegation that he had used a deadly weapon in the commission of the offense.[7] After finding the prior conviction allegations true, the trial court sentenced McNatt to 15 years to life on the murder count, doubled because of the previous strike (Pen. Code, § 667, subd. (e)(1)), plus a five-year consecutive determinate term for the prior strike (Pen. Code, § 667, subd. (a)(1)), plus a one-year consecutive term for the deadly weapon enhancement (Pen. Code, § 12022, subd. (b)(1)), for a total term of 36 years to life.

This appeal followed.

DISCUSSION

McNatt argues that his March 21 statement to Detective Horsman was involuntary and thus obtained in violation of his due process rights, and that the prosecution's failure to timely disclose Arrasmith's December 30 statement was error under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), requiring that his conviction be reversed.

I. McNatt's March 21 Statement Was Not Involuntary

A. *Additional Background*

Between 12:30 a.m. and 12:45 a.m. on March 21, Deputy Sheriff Collier placed McNatt, who was still handcuffed, in an interview room at the Sheriff's office. After exiting the room, Collier heard McNatt yelling obscenities and what sounded like a table or chair being knocked over. Collier reentered the room and told McNatt that he needed to calm down, and McNatt eventually did so. Collier then left the room and watched McNatt on a monitor, which revealed him saying a number of things to himself, including " 'I need this shit to wear off,' " " 'I'm exhausted,' " " 'I thought I did it right,' " " 'I did that shit,' " " 'I wish I had had more than a day and a half to figure everything out,' " " 'I wouldn't change anything,' " " 'I was sloppy. I won't let it happen again,' " and the name Ron.

[7] After McNatt was found guilty, Arrasmith entered a plea of no contest to the charge of accessory after the fact.

Video equipment in the interview room was turned on at approximately 1:17 a.m. At approximately 4:02 a.m., McNatt lay down on the floor and appeared to take a nap. At 4:51 a.m., Detective Horsman came in to the room, introduced himself, and asked if McNatt needed food or water, or to use the bathroom.

At 5:33 a.m., Horsman entered the room, removed McNatt's handcuffs, gave him water, and asked if he needed food or to use the bathroom. He returned shortly thereafter and gave McNatt a granola bar, then left again, returning at 6:36 a.m. He then offered McNatt water, food, and the use of the bathroom, all of which McNatt declined. Horsman returned at 7:35 a.m., offered McNatt food and water, and took him to use the bathroom. Horsman then gave McNatt a *Miranda*[8] advisement and asked whether McNatt understood the rights he had explained. McNatt responded "Yes," and the substantive interview began. Horsman interviewed McNatt until approximately 11:00 a.m., with several short breaks throughout the morning. At the conclusion of the interview McNatt's blood was drawn, and testing later revealed that it contained 140 nanograms per milliliter of methamphetamine, a "[n]ot particularly" large amount.

McNatt moved to exclude the March 21 statement, including on the grounds that it was involuntary. After a hearing, the trial court denied the motion and found that the statement was not involuntary, and thus that the prosecution could introduce the March 21 statement in its case-in-chief.

B. *Applicable Law*

The federal and California state Constitutions require prosecutors to establish, by a preponderance of evidence, that a defendant's confession was voluntarily made. (*People v. Boyette* (2002) 29 Cal.4th 381, 411.) "The test for the voluntariness of a custodial statement is whether the statement is ' "the product of an essentially free and unconstrained choice" ' or whether the defendant's ' "will has been overborne and his capacity for self-determination critically impaired" ' by coercion." (*People v. Cunningham* (2015) 61 Cal.4th 609, 642.) In making this assessment, courts must

[8] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

evaluate "the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) Relevant characteristics of the accused include the defendant's age, maturity, education, intelligence, mental health, and physical condition at the time of the interrogation. (*Id*. at p. 226; *People v. Boyette*, *supra*, at p. 411.) Relevant details of the interrogation include the location, length, and continuity of the interrogation, the nature of the questioning (such as aggressive, repeated, or prolonged questioning), the use of physical force or deprivation of food or sleep, and the lack of advice as to the defendant's constitutional rights. (*Schneckloth v. Bustamonte*, *supra*, at p. 226; *People v. Carrington* (2009) 47 Cal.4th 145, 175; *People v. Boyette*, *supra*, at p. 411.)

A ruling on the voluntary or involuntary nature of a confession is largely subject to de novo review on appeal. The trial court's findings as to the characteristics of the accused and the details of the interrogation are generally factual and thus reviewed for substantial evidence. (*People v. Benson* (1990) 52 Cal.3d 754, 779.) The ultimate issue of voluntariness is a question of law. (*Ibid*.) "Where, as was the case here, an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review." (*People v. Duff* (2014) 58 Cal.4th 527, 551.)

C. *Analysis*

McNatt argues that his March 21 statement was involuntary, noting that he was locked in an interview room for eight hours before his *Miranda* advisement, with his hands handcuffed behind his back for six of those hours, was tired and under the influence of methamphetamine, and was dependent on Detective Horsman for food, water, and to use the bathroom. With respect to his personal characteristics, he notes that he dropped out of the eleventh grade, and although he had prior juvenile adjudications and adult convictions, the most recent was more than seven years before the instant offense.

We agree with the trial court that McNatt's statement was not involuntary. It is true that McNatt was kept in the interview room for approximately seven hours before

any questioning began, but this in and of itself does not support a finding that his statements were involuntary. (See *People v. Thomas* (2012) 211 Cal.App.4th 987, 1010–1011 [finding statement voluntary where defendant was arrested at 9:46 p.m. and questioning began at 4:24 a.m.].) Detective Horsman did not attempt to coerce McNatt into offering a statement by withholding food, water, or use of the bathroom. Rather, McNatt's handcuffs were removed, and he was offered food, water, and the use of the bathroom several times before any questioning began. Nor did Horsman threaten or pressure McNatt or make any promises of leniency, telling McNatt that he seemed like a "good guy," that he was "not here to judge," and that he would "be straight up" with McNatt and would expect "honesty" in return. In short, rather than pressure or coerce McNatt into confessing, Horsman "chose to build rapport with [him] and gain [his] trust in order to persuade [him] to tell the truth." (*People v. Carrington*, *supra*, 47 Cal.4th at p. 175.) The characteristics of the interview were not such that McNatt's will was " ' "overborne and his capacity for self-determination critically impaired" ' by coercion." (*People v. Cunningham*, *supra*, 61 Cal.4th at p. 642.)

McNatt also argues that his statements were involuntary because he dropped out of the eleventh grade, was exhausted, had substance abuse problems, and although he had a criminal history, was not well versed in his *Miranda* rights. It does not appear that this argument was properly raised before the trial court, but in any event, it is not persuasive. To the extent McNatt argues these characteristics made him more susceptible to police coercion, as discussed above, we do not find that the interrogation itself was coercive or undermined McNatt's free will or voluntary choice. Nor does the record reveal that Detective Horsman was aware of, or in any way exploited these characteristics in obtaining the statement from McNatt. (See *People v. Dykes* (2009) 46 Cal.4th 731, 753 [" ' "The Fifth Amendment is not 'concerned with moral and psychological pressures to confess emanating from sources *other than official coercion*' " ' " quoting *People v. Smith* (2007) 40 Cal.4th 483, 502]; *People v. Weaver* (2001) 26 Cal.4th 876, 921 ["The due process inquiry focuses on the alleged wrongful and coercive actions of the state . . . and not the mental state of defendant."]; *People v. Cunningham*, *supra*,

61 Cal.4th at pp. 642–645.) We find no error in the trial court's conclusion that McNatt's statements were voluntary under the totality of the circumstances.

II. Reversal Is Not Required Under Brady Based on the Prosecution's Late Disclosure of Arrasmith's December 30, 2015 Statement

A. *Additional Background*

Trial began with opening statements on February 2, 2016. On February 16, during the prosecution's case-in-chief, defense counsel was cross-examining Detective Horsman regarding his various interviews with Arrasmith and asked him whether the last such interview took place on April 16, 2015. Horsman indicated that he believed the answer to the question might be privileged and asked to confer with the prosecutor, who requested an in camera hearing. The jury was then excused and an in camera hearing with the prosecution and Detective Horsman was held.

The prosecutor informed the trial court that Detective Horsman had in fact conducted an additional proffer interview with Arrasmith and his counsel on December 30, 2015, and that that interview had never been provided to the defense. Before the interview took place, the Sheriff's and District Attorney's offices had entered into an agreement with Arrasmith and his counsel that his statement would be kept under seal and confidential unless it contained any *Brady* material, in which case the agreement would be voided and the statement and agreement provided to the defense. The prosecution took the position that the interview contained no new information beyond what Arrasmith had already said in his previous statements, and thus that its disclosure was not required under *Brady*. The prosecution also indicated that the interview was videotaped but a transcript had not yet been created. The trial court reviewed the agreement at issue and ordered it admitted under seal, and continued the in camera hearing until the next morning to afford the prosecution the opportunity to consult with the management of their office.

At the continuation of the in camera hearing the next day, the prosecution indicated that it was in the process of having a transcript created of the interview, and in the meantime provided the trial court with the videotape.

After reviewing the tape, the trial court ruled that McNatt's right to a fair trial and the materiality of the statement outweighed any privilege or confidentiality asserted over the interview, and accordingly ordered the prosecution to produce the video by 12:30 p.m. that day, and a transcript of it to the defense by 10:00 a.m. on February 18th. The court further ordered that defense counsel should continue cross-examining Detective Horsman without reference to the December 30 interview, but the trial court indicated it would allow the defense to recall Detective Horsman after defense counsel had an opportunity to review the tape of the interview. Defense counsel's cross-examination of Detective Horsman then resumed.

The following day, McNatt filed a motion to dismiss the case with prejudice, alleging that the prosecution had violated *Brady* and its statutory discovery obligations, and the next day the prosecution filed an opposition.

The trial court issued a tentative ruling that there had been no *Brady* violation but that the December 30 statement should have been disclosed to the defense pursuant to the court's pretrial discovery orders. The trial court also ruled that the defense would be permitted to question Detective Horsman regarding the statement. After hearing argument, the trial court affirmed its tentative ruling, finding that any untimeliness of the disclosure could be cured by further questioning of Detective Horsman.

The defense case began on February 18. At its end, as a remedy for the late disclosure, the trial court allowed the defense to recall Detective Horsman to the stand and question him regarding the December 30 interview, and the tape of that interview (with the exception of certain references to the pending criminal charges against Arrasmith, certain hearsay statements, and Arrasmith's refusal to take a polygraph test) was played for the jury. The defense then rested. In her closing statement, defense counsel made repeated reference to the December 30 statement.

After the jury's verdict, McNatt moved for a new trial based on the late disclosure of the December 30 statement. The trial court denied the motion, finding that "there was no *Brady* material in this statement that would have caused Mr. McNatt to not have a fair

trial" and that any error had been cured by allowing the defense to play the video of the interview for the jury.

B. *Applicable Law*

McNatt alleges the prosecution's failure to timely disclose the December 30 statement violated the discovery statutes and constituted *Brady* error. "A trial court's discovery rulings are reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.) The trial court possesses the discretion to determine what sanction is appropriate to ensure a fair trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951.) Under *Brady*, 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' (*Brady, supra,* 373 U.S. at p. 87.)" (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 466 (*Mora*).)

"Evidence actually presented at trial is not considered suppressed for *Brady* purposes, even if that evidence had not been previously disclosed during discovery. (*People v. Verdugo* (2010) 50 Cal.4th 263, 281, (citing *People v. Morrison* (2004) 34 Cal.4th 698, 715); but see *U.S. v. Devin* (1st Cir. 1990) 918 F.2d 280, 289; *U.S. v. Scarborough* (10th Cir. 1997) 128 F.3d 1373, 1376.) In *U.S. v. Devin* and *U.S. v. Scarborough*, the First and Tenth Circuit Courts of Appeals addressed an issue similar to the one presented here, explaining that when considering whether delayed disclosure rather than 'total nondisclosure' constitutes a *Brady* violation, 'the applicable test is whether defense counsel was "prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case." ' (*U.S. v. Devin, supra,* 918 F.2d at p. 289; see also *U.S. v. Scarborough, supra,* 128 F.3d at p. 1376.) Both courts examined exculpatory evidence belatedly disclosed, ultimately finding no error arose from that delayed disclosure. (*U.S. v. Devin*, *supra*, 918 F.2d at p. 289; see also *U.S. v. Scarborough*, *supra*, 128 F.3d at p. 1376.)" (*Mora, supra,* 5 Cal.5th at p. 467.)

C. *Analysis*

Much of McNatt's briefing is devoted to arguing that the December 30 statement was material, that it impeached Arrasmith's credibility, that it tended to support the

defense theory of the case (i.e., that Arrasmith had himself committed the murder and that McNatt was at most an accessory after the fact), and that it should have been timely disclosed. But as discussed above, the December 30 statement *was* disclosed at trial and presented to the jury during the defense's case. The question is therefore not whether the statement was material, but " 'whether defense counsel was "prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case." ' " (*Mora, supra*, 5 Cal.5th at p. 467.) We agree with the trial court that defense counsel was not.

Certainly the information in the December 30 statement did not change the primary defense theory of the case, which was that Arrasmith had committed the murder while McNatt was at McDonald's shortly after 10:00 p.m. Defense counsel so represented in her opening statement, telling the jury that when McNatt returned from McDonald's "things are different" and that Sauvageau "is still there, but there is a very large pool of blood on the floor of the trailer where [he] is that was not there before." McNatt testified in his own defense to the same effect. Again in her closing argument, defense counsel presented this theory of the case to the jury, this time making repeated reference to the December 30 statement. Indeed, McNatt's reply brief concedes that even "[*b*]*efore* trial the defense made clear its theory that Arrasmith killed Sauvageau." (Italics added.) Although McNatt asserts that the late disclosure of the December 30 statement affected defense counsel's "preparing [. . .] Opening Statement or her planned cross-examination of prosecution witnesses," he does not explain how.

With respect to how the late disclosure may have prejudiced defense counsel's investigation of the case, McNatt points only to the portion of the December 30 statement where Arrasmith for the first time claimed he visited "Agua Caliente" looking for drugs on the night of the murder. McNatt notes that Arrasmith drove a distinctive three-wheeled bicycle and argues that "looking at cameras in the Agua Caliente neighborhood would have been crucial to confirming or disputing his new timeline, which went to his credibility." But as the Attorney General notes, Arrasmith did not provide any specific location or timeframe in the Agua Caliente neighborhood that could have been searched

for video cameras. McNatt also does not explain why any such investigation could not have been conducted in between the time the December 30 statement was disclosed to the defense on February 17 and when the defense rested its case on February 25. Nor did defense counsel request a continuance in order to investigate the new information regarding Agua Caliente, or any other new information in the December 30 statement. (See *Mora*, *supra*, 5 Cal.5th at p. 469 [finding no prejudice from late disclosure where "short of a new trial, neither [defendant] sought a remedy the court did not provide"].) In sum, McNatt has failed to demonstrate that the delay in disclosure of the December 30 statement prevented him from effectively using that statement in preparing and presenting his case.

III. *McNatt Is Entitled to a Remand Under Senate Bill. No. 1393*

We originally issued an opinion in this case on September 28, 2018. Two days later, the governor signed Senate Bill No. 1393. That legislation amends Penal Code section 1385 to grant the trial court the discretion to strike a five-year sentence enhancement for a previous serious felony conviction under Penal Code section 667, subdivision (a)(1), effective January 1, 2019.[9] As noted, McNatt was sentenced to an additional five-year term under Penal Code section 667, subdivision (a)(1) based on his 1994 burglary conviction. After our opinion issued, McNatt filed a petition for rehearing arguing that he is entitled to a remand for resentencing under Senate Bill No. 1393, and we granted the petition and ordered the parties to file supplemental briefs addressing the effect of Senate Bill No. 1393 on McNatt's sentence.

The Attorney General concedes that after January 1, 2019, Senate Bill No. 1393 applies to McNatt's sentence retroactively because the judgment is not yet final. (See

[9] Penal Code section 1385, subdivision (b) previously provided that section 1385 did "not authorize a judge to strike any prior conviction for purposes of enhancement of a sentence under Section 667." The amended Penal Code section 1385, subdivision (b)(1) provides: "If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a)." (Sen. Bill No. 1393 (2017-2018 Reg. Sess.) § 1 and § 2.)

People v. Garcia (2018) 28 Cal.App.5th 961, 971–973 [finding that Senate Bill No. 1393 applies retroactively and remanding for resentencing after January 1, 2019].) However, the Attorney General argues that remand for resentencing is unnecessary because the record clearly demonstrates that the trial court would not have stricken the prior conviction enhancement even if it had had the discretion to do so. (See *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110 ["Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so."]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427.)

At sentencing, McNatt moved to strike the burglary prior for both purposes of two-strike sentencing and the five-year enhancement under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). In denying the *Romero* motion, the trial court noted that McNatt did not remain free of criminal activity between the burglary and the present offense, noted that he was using drugs and did not take steps to address his drug use, described the offense as "a brutal murder," and emphasized McNatt's bizarre actions after the murder itself. It is true, as the Attorney General argues, that Senate Bill No. 1393 permits dismissal of an enhancement "in furtherance of justice," and similarly, motions to dismiss a prior strike under *Romero* involve the "furtherance of justice" standard. (Pen. Code § 1385, subd. (a); *Romero*, *supra*, 13 Cal.4th at p. 530.) However, the *Romero* motion sought to dismiss the prior strike, presumably reducing McNatt's sentence by 20 years (from 36 to 16 years to life), whereas striking the prior conviction enhancement under section 1385 would result only in a five-year reduction in his sentence. Under the circumstances, we will order a remand to permit the trial court to exercise its newfound discretion under Senate Bill No. 1385.

DISPOSITION

The case is remanded to the trial court for the limited purpose of permitting the trial court to decide whether to exercise its discretion to strike the five-year enhancement imposed under Senate Bill No. 1385. In all other respects, the judgment is affirmed.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Miller, J.

A150775; *P. v. McNatt*